DOCKET FILE COPY ORIGINAL

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY, NEW YORK, NEW YORK 10271

ELIOT SPITZER
Attorney General

MARY ELLEN BURNS
Assistant Attorney General in Charge
Bureau of Telecommunications and Energy

November 8, 1999

RECEIVED
NOV - 8 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 99-295

Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
Room TW-B-204
445 Twelfth Street, SW
Washington, DC 20554

Dear Ms. Salas,

Please accept for filing in the above entitled case, the attached Reply Comments of New York State Attorney General Eliot Spitzer, which consist of an original and six copies as well as a CD-ROM with our comments in read-only format, as required by FCC Public Notice, September 28, 1999.

By separate cover, we are submitting today twelve copies of these Reply Comments to Janice Myles, Policy and Program Planning Division, Common Carrier Bureau, Room 5-C-327, as also required by the September 28 Public Notice.

Thank you very much.

Sincerely,

Mary Ellen Burns
Attorney for
NYS Attorney General Eliot Spitzer

New York State Attorney General's Office
Telecommunications and Energy Bureau
120 Broadway
New York, New York 10271
phone: 212-416-6343

No. of Copies rec'd 0+6
List ABCDE
1-CD

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
NOV - 8 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Application by New York Telephone Company	)	
(d/b/a Bell Atlantic-New York), Bell Atlantic	)	
Communications, Inc., NYNEX Long Distance	)	CC Docket No. 99-295
Company, and Bell Atlantic Global Networks,	)	
Inc., for Authorization to Provide In-Region	)	
InterLATA Services in New York	)	

REPLY COMMENTS OF ELIOT SPITZER
ATTORNEY GENERAL OF THE STATE OF NEW YORK

Mary Ellen Burns
Assistant Attorney General in Charge
Telecommunications and Energy Bureau

Charlie Donaldson
Assistant Attorney General
Telecommunications and Energy Bureau
of counsel

New York State Attorney General's Office
120 Broadway, room 23-76
New York, NY 10271
(212) 416-6343
FAX (212) 416-8877

November 8, 1999

TABLE OF CONTENTS

SUMMARY OF ARGUMENT

Having read the comments filed in this proceeding, including the evaluations of the New York State Public Service Commission ("NYSPSC") and the United States Department of Justice ("DOJ"), the New York State Attorney General ("NYSAG") continues to believe that this Commission would be hard-pressed to conclude that Bell Atlantic-New York ("BA-NY") has fully met the requirements of Section 271 for approval to enter the in-region interLATA market in New York at this time. Even if the Commission considers new evidence available after the filing of BA-NY's application, as we suggested in our initial comments of October 19, such new evidence as currently exists does not appreciably advance the case for BA-NY's assertion that its local exchange market is fully and irreversibly open to competitive entry.

In particular, the record continues to reflect that BA-NY does not provide nondiscriminatory access to its unbundled network elements ("UNEs") with regard to the flow-through of UNE orders, the provisioning of loop "hot cuts," the retention of directory listings, and the provisioning of high-speed data loops. Additionally, the amended Performance Assurance Plan and Change Control Assurance Plan ("PAP/CCAP")[1] anti-backsliding measures

[1] *Order Adopting the Amended Performance Assurance Plan And Amended Change Control Plan*, Cases 97-C-0271 - Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLata Entry Pursuant to Section 271 of the Telecommunications Act of 1996, and 99-C-0949 - Petition filed by Bell Atlantic - New York for Approval of a Performance Assurance Plan and Change Control Plan, in 97-C-0271, mimeo, p. 8 (issued and effective November 3, 1999).

have now been adopted by the NYSPSC without any of the significant modifications sought by the NYSAG and set forth in our initial comments.

Notwithstanding these deficiencies, it is still clear that BA-NY has gone a very long way towards compliance with the requirements of the statute and continues to make efforts to improve its performance. Under these circumstances, unique in the record of Section 271 applications to date, the Commission should take pains to ensure that it will grant approval at the earliest possible moment after BA-NY can demonstrate that it has remedied the existing deficiencies.

Neither the language of Section 271, nor prior Commission orders, nor good regulatory policy provides a firm basis for the Commission to condition its approval of BA-NY's application, however specific those conditions might be. Rather, the Commission should consider two other possible courses: (1) to reject the application and immediately restart the review period if new evidence available before the close of the current review period indicates that BA-NY can show that it is meeting the requirements of Section 271; or (2) to reject BA-NY's application, specifying where BA-NY has met the checklist and setting forth the precise conditions BA-NY must meet to demonstrate full compliance. Under either approach, the Commission should also consider shortening the 90-day review period upon reapplication, if appropriate and if consistent with due process protections to BA-NY, interested parties, NYSPSC, and DOJ.

ARGUMENT

I. The Current Record Does Not Permit The Conclusion That BA-NY's Local Market Is Fully and Irreversibly Open To Competitive Entry.

Upon the current record, including all the comments and evaluations filed to date, BA-NY has not demonstrated its compliance with Section 271. While the areas of deficiency are few in number, they are great in consequence for competitive entry. We agree with Commissioner Powell that the "perfect" should not become "the enemy of the good,"[2] but in critical areas, BA-NY is starkly not providing nondiscriminatory access. Under Section 271, each and every item of the checklist must be fully satisfied, and each item which is not satisfied is a separate ground for denial of the application.[3] The Commission has made clear in prior orders that BA-NY's local market cannot be almost open to competition. The local market must be fully and irreversibly open. Based on the current record, it is not.

The Commission has the final say on whether the requirements of Section 271 have been met and, in making its determination, DOJ's evaluation must be accorded substantial weight under the statute.[4] If DOJ concludes that a Section 271 applicant has not met the requirements of

---

[2] *In the Matter of the Application of BellSouth Corporation et al., for Provision of In-region, InterLATA Services in Louisiana,* CC Docket No. 98-1221, *Memorandum Opinion and* Order, 13 FCC Rcd. 20599 (October 13, 1998) ("*Louisiana II*"), *Statement of Commissioner Michael K. Powell. See also Louisiana II,* ¶ 59 ("...no finder of fact can expect proof to an absolute certainty.")

[3] *Id.*, ¶¶ 50,51.

[4] § 271(d)(2)(A). *See also Louisiana II,* ¶¶ 14.

the statute, the applicant must submit "more convincing evidence than that provided by [DOJ] in order to meet its burden of proof."[5] The DOJ evaluation in this proceeding can only be read for the proposition that BA-NY's application does not met the requirements of Section 271.[6]

The NYSPSC's evaluation is also required under the statute, specifically as to Section 271 checklist compliance.[7] It is up to this Commission, however, to determine "whether the factual record supports a conclusion that particular requirements of Section 271 have been met."[8]

We discuss below those parts of the factual record to date which do not support such a conclusion.

II. BA-NY Has Still Not Completely Satisfied Each Of The Checklist Requirements.

A. BA-NY Must Improve Its Performance In A Few Significant Areas To Provide CLECs Non-Discriminatory Access To Unbundled Network Elements.

Our comments identified the importance of unbundled network elements ("UNE") to local telephone service competition and the crucial role that BA-NY's operations support system

---

[5] *See, e.g., Louisiana II*, ¶ 52; *In the Matter of Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and* Order, 13 FCC Rcd. 539 (December 24, 1997) ("*South Carolina*"), ¶ 37; *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region InterLATA Services in* Michigan, CC Docket No. 97-137, *Memorandum Opinion and Order*, 12 FCC Rcd. 20543 (August 19, 1997) ("*Michigan*"), ¶ 46.

[6] *DOJ Evaluation*, pp. 42-43.

[7] § 271 (d)(2)(B).

[8] *Louisiana II*, ¶ 18.

("OSS") plays in the use of UNEs by competing local exchange carriers ("CLECs"). BA-NY's August 1999 C2C results indicated that there were major problems with the services BA-NY provided CLECs, including problems with processing CLEC UNE orders and provisioning stand alone unbundled local loops.[9] Therefore, we urged the FCC to take into account CLEC comments and NYSPSC data on BA-NY's performance in September 1999 to determine whether the company has made sufficient progress to comply with the Section 271 checklist.

The data on BA-NY's OSS operations in September 1999 ("September C2C Report") is now available.[10] This data indicates that the OSS problems identified in the August C2C Report have not been fixed. This conclusion is substantiated by CLEC comments addressing OSS.[11] However, BA-NY should be able to remedy the identified problems within a reasonable amount of time.

1. BA-NY Must Improve Its Ability To Flow Through CLEC UNE Orders So As To Provide Nondiscriminatory Access.

a. The Current Performance Data.

The September C2C Report indicates that BA-NY is still unable to process electronically a substantial number of CLEC UNE orders. Like the August C2C Report, the September C2C

---

[9] *August 1999 Carrier to Carrier Performance Standards and Reports, Bell Atlantic - New York State.* ("August C2C Report").

[10] *September 1999 Carrier to Carrier Performance Standards and Reports, Bell Atlantic - New York State.* A copy of the September C2C Report is attached to the November 1, 1999 *Evaluation Of The United States Department Of Justice* ("*DOJ Evaluation*") as Exhibit 6.

[11] *See, e.g., MCI Comments*, pp. 9-19; *AT&T Comments*, pp.15-22, *Prism Comments*, pp. 15-17..

Report includes three different measurements for BA-NY 's processing of CLEC UNE orders. The measurements vary according to the type of UNE orders processed.

The first measurement, *OR-5-01: Flow Through-Total*, tracks by month the percentage of total UNE orders CLECs place electronically that BA-NY processes electronically. Total UNE orders include orders that BA-NY has designed its OSS to process electronically as well as those that OSS is set up to divert for manual processing. In August BA-NY processed electronically 59.28% of all UNE orders CLECs placed electronically. The September C2C Report shows that 62.81% were processed electronically. Thus, BA-NY does not flow through over one third of total UNE orders CLECs place through BA-NY's OSS.

The second measurement, *OR-5-02: Flow Through-Simple*, tracks by month the percentage of simple UNE orders CLECs place electronically that BA-NY processes electronically. As with total UNE orders, the measurement of simple UNE orders covers both orders that BA-NY has set up its OSS to process electronically and those that OSS is designed to divert for manual processing. In August BA-NY processed electronically 60.42% of all simple UNE orders placed electronically. The comparable figure for September was 64.00%. Thus, BA-NY does not flow through over one third of the UNE orders being measured.

The third measurement, *OR-5-03: Flow Through Achieved*, tracks by month the percentage of UNE orders BA-NY's OSS is set up to flow through electronically that BA-NY actually flows through electronically. The September result (69.65%) was slightly worse than the result reported for August (73.06%).

In addition to the aggregated UNE order processing data in the September C2C Report, the DOJ evaluation includes disaggregated September data for the processing of UNE-Loops.[12] The September data shows that total flow-through for UNE-Loop orders was a mere 17.35% and that flow-through for complex UNE-Loop orders was zero,[13] data which is masked in the aggregate flow-through numbers in the September C2C Report. The low level of UNE-Loop flow through is entirely inconsistent with a local telephone service market that is irreversibly open to competition.

In summary, in September BA-NY processed manually over one third of all the UNE orders CLECs placed through BA-NY's OSS, over 80% of the UNE-Loop orders placed through OSS and all the complex UNE-Loop orders submitted through OSS.

The high percentage of manual processing of UNE orders raises serious questions about BA-NY's ability to provide nondiscriminatory access to UNEs. As DOJ observed, "heavy reliance on manual processing unnecessarily increases CLEC costs and creates a significant risk that there will be customer-affecting service problems when order volumes substantially increase."[14] Such cost increases and service problems may impair competition, especially as CLECs attempt to compete more vigorously for BA-NY customers.[15]

---

[12] *DOJ Evaluation*, Ex. 3.

[13] *DOJ Evaluation*, Ex. 3, p. 5.

[14] *DOJ Evaluation,* pp. 29-30.

[15] *Id.* at 31-33. *See, e.g., Louisiana II*,¶ 138.

b. BA-NY's Commitment To Improve Flow Through In The Future.

In its evaluation, the NYSPSC agrees that BA-NY needs to improve its flow-through performance, but draws a different conclusion from the data on BA-NY's UNE order flow-through and CLEC testimony and argument in the NYSPSC proceedings.[16] The NYSPSC found that BA-NY was able to provide CLECs nondiscriminatory access to UNEs, based on an NYSPSC staff analysis that attributed BA-NY's low UNE order flow-through rates primarily to BA-NY's OSS design. The NYSPSC also relied on an October 8, 1999 BA-NY commitment to improvements.[17] The NYSPSC found sufficient BA-NY's statement that it would integrate pre-ordering with UNE ordering, conduct monthly company workshops for CLECs to reduce the number of CLEC errors that hinder flow-through, and implement OSS design changes in three stages: at the end of October 1999, in December 1999 and in February 2000. According to the NYSPSC, the first OSS change should increase the overall UNE order flow-through by 18%, the second change should increase the rate by an additional 4% and the third change should add 8% to flow through.[18] The NYSPSC predicts that this plan, when fully implemented, should result in over 90% of UNE orders flowing through.[19]

---

[16] *Evaluation of the New York Public Service Commission, ("NYSPSC Evaluation,")* pp. 45 - 47.

[17] *Id.*, p. 47.

[18] *Ibid.*

[19] *Ibid.*

The current record does not indicate whether BA-NY has, in fact, integrated pre-ordering with UNE ordering, conducted workshops for CLECs or carried out the first phase of OSS change. However, even if it has done so, these efforts must result in demonstrably higher flow-through performance before the checklist requirements can be adjudged to have been met.

c. Performance Level BA-NY Must Achieve In Order To Demonstrate Compliance With The Checklist.

BA-NY must demonstrate to the Commission that the company's OSS is functioning in a nondiscriminatory manner. The question is how to judge whether BA-NY OSS is flowing through UNE orders at the required level. One possible source of standards and data for making such a judgment is the NYSPSC C2C metrics discussed in Part II(A)(1)(a). However, the C2C metrics aggregate the flow-through data and provide a standard (99% flow-through) for only one metric (*OR-5-03: Flow Through Achieved*). Meeting a 99% standard may be more than is necessary to demonstrate that the local market is open. In any event, the standard is not applicable to the crucial measurement, the percentage of total UNE orders that flow through (*OR-5-01*: *Flow Through-Total*). The NYSPSC has not yet developed a standard for flow-through of all UNE orders.

Another possible method of ascertaining whether BA-NY is flowing through UNE orders at an acceptable level is to compare those levels with BA-NY's processing of its internal orders used to initiate provisioning of services for BA-NY retail customers. So far as we can ascertain, the record before the Commission does not contain data on the proportion of its internal retail service orders BA-NY is able to flow through. Consequently, it is not possible to determine at

this time how BA-NY's processing of its internal service orders compares to its flow-through of UNE orders.

In all likelihood there are significant technical questions concerning how to obtain a valid comparison between internal BA-NY order processing and the company's processing of UNE orders. However, if a means of constructing such a comparison and validating the data used can be found, this should enable the Commission to judge whether BA-NY provides nondiscriminatory access to UNEs with regard to flow-through.

BA-NY's application should not be approved without a demonstration of significant improvement in UNE flow-through. To determine whether BA-NY's planned OSS changes have an impact, CLEC UNE order processing data should be disaggregated into three categories: (1) UNE-Platform; (2) UNE-Loop for other than xDSL; and (3) UNE-Loop for xDSL. Comparing this disaggregated CLEC data with BA-NY data indicating that it is flowing through comparable internal orders for retail services [20] should enable the Commission to determine that BA-NY has met its burden of showing compliance with § 271.

[20] It can be argued that UNE orders are not equivalent to BA-NY internal retail service orders and cannot be usefully compared. Some UNE orders, such as loop hot cuts, have no internal BA-NY equivalent. But some UNE orders and BA-NY internal retail service orders should be functionally equivalent. A UNE order to add a customer feature (Call Waiting, Call Forwarding, etc.) to a CLEC customer served through a line employing UNE-Platform should be comparable to an internal BA-NY order to add the same feature to a BA-NY retail customer's line.

2. BA-NY Must Improve Its Provisioning Of Stand Alone Unbundled Local Loops.

a. Stand Alone Unbundled Local Loops For Conventional Services.

BA-NY's ability to provision stand alone unbundled local loops by switching a customer's existing line from BA-NY's dial tone to a CLEC's, *i.e.*, to perform a "hot cut," has been a major point of dispute between BA-NY and the CLECs in the NYSPSC proceeding in this matter. DOJ has found that BA-NY's provisioning of hot cuts is still deficient.[21] Based on the evidence at this time, we concur. The question is what can BA-NY do to resolve this issue so as to comply with Section 271.

CLECs indicate that access to loops provisioned by hot cuts would be materially improved if BA-NY tests the loop before the scheduled hot cut date and notifies the CLEC of any problem that would interfere with transfer of the loop at the scheduled delivery date.[22] Such testing, commonly referred to as "due date minus two" or "DD-2," has been part of the required UNE loop provisioning process since March 1999.[23] CLECs assert that BA-NY's consistent performance of such DD-2 testing is essential for them to deliver service to their customers on time via hot cuts, in that without the notice of problems DD-2 provides, they will not be ready on

---

[21] *DOJ Evaluation*, pp. 14-15.

[22] *See, e.g., AT&T Comments*, pp. 34-37.

[23] *Ibid.*

a promised delivery date and will have to reschedule a customer's services.[24] Such delivery delays impair CLEC ability to compete effectively.[25]

If consistent performance of DD-2 testing can lead to higher BA-NY performance on the delivery of hot cuts, then BA-NY should be pushed to actually do DD-2 testing before each scheduled hot cut. In measuring BA-NY's provisioning of hot cuts, a BA-NY failure to perform DD-2 that causes a CLEC to be late delivering service to its customers should be scored against BA-NY. On November 3, 1999, the NYSPSC adopted such a scoring provision, as part of the PAP/CCAP,[26] but BA-NY will not be scored acording to the PAP/CCAP provision until it receives approval for long distance entry. Such scoring should be applied to BA-NY's performance at this time, not simply after entry, in order to see whether adherence to DD-2 leads to improvement in provisioning of hot cuts sufficient to conclude that BA-NY has met the checklist requirements with respect to this issue.

b. Stand Alone Unbundled Local Loops For xDSL And Other High Speed Data Services.

BA-NY's acknowledgment in its initial filing that it has problems supplying stand alone unbundled local loops to CLECs offering xDSL and other high speed data services[27] has been

---

[24] *Id.*, p. 35.

[25] *Id.*, p. 37.

[26] *PAP/CCAP, n. 1, supra.* Under this order, failures to perform the DD-2 test are not counted against BA-NY's performance if the CLEC is able to complete a service installation on time anyway.

[27] *BA-NY Application, Brief*, p.19.

confirmed by the NYSPSC[28] and the CLECs.[29] According to the NYSPSC, problems with providing nondiscriminatory access to xDSL and other high speed data services are being addressed in a collaborative effort by BA-NY and the CLECs. The NYSPSC is optimistic that this effort will resolve many of the issues and indicates that it expects recommendations from the collaborative in December.[30]

Based on the evidence concerning xDSL and related services, DOJ has indicated that it is "unable to conclude on the current record that [BA-NY] has demonstrated an acceptable level of performance" to qualify under Section 271. We concur. BA-NY must provide CLECs offering these innovative telecommunications services "a meaningful opportunity to compete."[31] The question is what must BA-NY do in order to open its local network to high speed data service competitors so as to comply with Section 271.

The CLECs offering xDSL and other high-speed data services indicate that at this time BA-NY restricts what they can do with a line and the way lines used for such services are provisioned.[32] It appears the collaborative effort will address BA-NY's obligation to supply the

---

[28] *NYSPSC Evaluation*, pp. 92-95.

[29] *See, e.g., NorthPoint Comments*, pp. 17-21; *Prism Comments*, pp. 8-15; *Covad Comments*, pp. 5-6, 13-14.

[30] *NYSPSC Evaluation*, p. 94.

[31] *Louisiana II*, ¶198. *Id.*, ¶¶ 184, 187. On the requirement to provide UNEs for high speed data services, *see also "FCC Promotes Local Telecommunications Competition," FCC New Release* (September 15, 1999).

[32] For example, Prism Communication Services, Inc. indicated in its comments that BA-NY seeks to prohibit Prism from using analog two-wire lines (Basic Link or POTS lines) to

CLECs with the lines they need.[33] Whether BA-NY's objections to CLEC requests are appropriate and how to implement the changes CLECs need will be among the issues raised at the NYSPSC collaborative.

While the collaborative can address these issues and others, the record clearly indicates that CLECs need better access now to information about BA-NY loops. As DOJ observed, CLECS offering data services "need detailed information about available loops so that they can quickly determine whether a prospective customer can be served and what grade of service can be offered."[34] CLECs assert that both the loop data and the access to that data that BA-NY currently provides them are inadequate for meaningful competition.[35] BA-NY has indicated that it is working on providing CLECs the requisite information.[36] This deficiency should be remedied before Section 271 approval is granted.

Another issue that should be resolved to determine compliance with the Section 271 is the validity of the data BA-NY reports about its provisioning of UNE-Loops for use by xDSL

---

supply the high speed data service it markets. Prism argues that it does not need a DSL-conditioned line and therefore should not have to incur the extra expense of such. Prism also contends that BA-NY will not "hot cut" lines for it and that this refusal inhibits its ability to offer a full range of voice and data services over the same line. *Prism Comments*, pp. 16-19. *See also, e.g., Network Access Solutions Comments*, pp. 5, 8-9 (alleged discrimination in use of long loops); *Association For Local Telecommunications Services Comments*, pp. 33-36.

[33] *NYSPSC Evaluation*, pp. 94-95.

[34] *DOJ Evaluation*, p. 25.

[35] *See, e.g., Sprint Comments*, pp. 11-13.

[36] *BA-NY Application, Brief*, p. 21; *DOJ Evaluation*, Ex. 7.

and other high speed data service providers. BA-NY reports that it currently provisions UNE-Loops for xDSL and similar CLECs in approximately the same time as it takes for BA-NY to install its ADSL service for its retail customers.[37] The CLECs dispute BA-NY's data on UNE-Loop provisioning for high speed data competitors and assert that BA-NY's provisioning of such loops takes far longer than BA-NY reports.[38] This dispute needs to be resolved quickly so that BA-NY will be in a position to show that its provisioning of UNE-Loops for data services is nondiscriminatory and therefore meets the Section 271 checklist.

B. Customers Who Change Local Telephone Service Providers Should Not Be Removed From Directory Assistance Or Listings.

CLEC comments[39] and DOJ's evaluation[40] confirm the Attorney General's concern that customers who change local telephone service providers risk being dropped from directory assistance and listing because of the way BA-NY processes unbundled local loops supplied to CLECs. Such a risk is inconsistent with Section 271 and with an irreversibly open local telephone service market. To show that it provides CLECs nondiscriminatory access to

---

[37] *DOJ Evaluation,* Ex. 3, p. 2. The data reported for September is that BA-NY installed its own ADSL service in 7.69 days and that the company took 7.88 days to install UNE-Loops for xDSL customers and 9.69 days to install 2 wire digital UNE-Loops.

[38] *See, e.g., Covad Comments, Declaration Of Dennis Coney And Lucie Poulicakos*, p. 4 (assertion that BA-NY provisioning of UNE-Loops for Covad takes 40 days on average); *Prism Comments*, pp. 8-12; *Network Access Solutions Comments*, pp. 7-8; *NorthPoint Comments*, pp. 18-19 (NorthPoint asserts that when computing its UNE-Loop provisioning data BA-NY counts a loop as delivered on time regardless of whether the loop works or not).

[39] *Choice One Comments*, pp. 7-8; *AT&T Comments*, pp. 41-44.

[40] *DOJ Evaluation*, pp. 19-20.

unbundled local loops consistent with Section 271, BA-NY should modify its software so that the listings for customers who change their local service to a CLEC remain in directory assistance and listings.

III. The Antibacksliding Plans Adopted By The NYSPSC Are Inadequate To Ensure That The New York Local Telephone Service Market is Irreversibly Open To Competition.

On November 3, 1999, the NYSPSC adopted the amended PAP/CCAP without remedying any of the deficiencies sought by the NYSAG and also set forth in our comments.[41] As adopted, the PAP/CCAP is not adequate to ensure that the New York local service market will be irreversibly open after entry, nor is it a substitute for achieving compliance with the requirements of Section 271 in order to gain entry.

IV. The Commission Should Take Steps To Ensure An Early Decision When BA-NY Can Demonstrate That It Is Fully Compliant With Section 271.

Competition in both the New York local exchange market and in the long distance market would best be served if BA-NY receives approval as soon as possible after it submits an application which demonstrates compliance with Section 271 (including the fourteen point checklist, the requirements of Section 272, and the public interest requirements). Because BA-NY is close to meeting these requirements, it would be appropriate for the Commission to ensure

---

[41] *See n. 1, supra.* One of the PAP/CCAP deficiencies the NYSAG identified in initial comments was the plan's numerous waiver provisions. On this point we referred to BA-NY's 17 waiver requests under the Performance Regulatory Plan ("PRP"), which addresses the quality of the service BA-NY provides end users. On Thursday, November 4, 1999, the NYSAG was served a copy of BA-NY's 18th waiver request under the PRP, *"Petition of Bell Atlantic-NY for a Waiver of Certain Service Results Measured Under the PRP for September 1999,"* dated November 1, 1999.

that, consistent with due process to all the parties and commenters, no delay in approval occurs after full compliance is shown.

To approve BA-NY's pending application with conditions would not be consonant with Section 271, which, as the Commission has consistently affirmed, requires a finding that BA-NY has fully implemented the checklist and each item in it.[42] DOJ asserts, and we agree, that "local telecommunications markets must be shown to be fully and irreversibly open to competition before the BOC may offer long distance services."[43] Moreover, conditioning BA-NY's application would set a precedent for every other application in the future, would tend to unravel Section 271's tightly woven deadlines and standards for approval,[44] and could require the Commission to extensively oversee BA-NY's efforts to meet the conditions imposed.

As a better approach, given BA-NY's strong application, unique to date in the short history of Section 271 applications, the Commission should consider one of two courses: (1) to reject the application and immediately restart the review period if new evidence available before the close of the current review period indicates that BA-NY can show that it is meeting the requirements of Section 271; or (2) to reject BA-NY's application, specifying where BA-NY has met the checklist and setting forth the precise conditions BA-NY must meet to demonstrate full

---

[42] *See, e.g., Louisiana II*, ¶¶ 3, 49; *Michigan*, ¶¶ 105, 108.

[43] *DOJ Evaluation*, p. 37.

[44] Mindful of the deadlines and standards in Section 271, the Commission has set forth stringent and precise rules to be followed in proceedings under the statute. *"Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act," FCC Public Notice* (September 28, 1999). *See Michigan*, ¶¶ 49-54.

compliance. Under either approach, the Commission should also consider shortening the 90-day review period upon reapplication, if appropriate and if consistent with due process protections to BA-NY, interested parties, the NYSPSC, and DOJ.

There is some precedent in prior Commission orders for such an approach. The Commission order in *Louisiana II*, for example, in denying BellSouth's application, nonetheless took pains to identify the checklist items with which BellSouth was in compliance, and also set forth its public interest reasoning for future guidance, even though it did not reach the public interest question in the application at hand.[45] The Commission has also indicated that it could "restart the clock" on the 90-day review period, if appropriate, although not with reference to the kind of circumstances present here.[46]

DOJ has also suggested, *inter alia*, a similar procedure,[47] and, as noted above, their evaluation is entitled to substantial weight under the statute. The approach we suggest here would serve the public interest by giving BA-NY the best possible chance to show, as quickly as possible, that it has complied with the requirements of Section 271, while at the same time safeguarding both the substantive requirements and the strict time frames of the statute.

CONCLUSION

As noted in our initial comments, New Yorkers have a great interest in seeing the local exchange market opened to competitive entry, but their interests will not be served by a

---

[45] *Louisiana II*, ¶¶ 8, 11, 361.

[46] *See Louisiana II*, ¶ 368; *Michigan*, ¶ 50, and case cited therein.

[47] *DOJ Evaluation*, page 42.

premature approval of BA-NY's application. Neither will their interests be served if BA-NY delays coming into compliance with the statute or cannot get speedy approval when it does. The Commission should adopt a procedure which permits BA-NY to know exactly what steps it must take to achieve compliance, accommodates the concern that a decision on entry not be unduly prolonged, and maintains the goals of the statute and the rigorous means it requires to accomplish them.

Respectfully submitted,

Mary Ellen Burns
Assistant Attorney General in Charge
Telecommunications and Energy Bureau

Charlie Donaldson
Assistant Attorney General
of counsel

New York State Attorney General's Office
120 Broadway
New York, NY 10271
(212) 416-6343
FAX (212) 416-8877
E-mail:mary.burns@oag.state.ny.us
charlie.donaldson@oag.state.ny.us